



252762

 IN THE MATTER OF:

RAWLEIGH BUILDING SITE

City of Freeport, County of Stephenson

State of Illinois

 Tusc. Corp. No. 1, Inc., Tusc. Corp. No. 4, Inc.,
 Tusc. International, GP and The Tuscarora
 Corporation

SETTLING PARTIES

)
) AGREEMENT FOR RECOVERY
) OF PAST RESPONSE COSTS

)
) U.S. EPA Region 5
)

)
) PROCEEDING UNDER SECTION
) 122(h)(1) OF CERCLA
) 42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to the Superfund Director by Regional Delegation No. 14-14-D.

2. This Agreement is made and entered into by EPA and Tusc. Corp. No. 1, Inc., Tusc. Corp. No. 4, Inc., Tusc. International, GP ("Settling ATP Respondents") and The Tuscarora Corporation (together with the Settling ATP Respondents, "Settling Parties"). Each Settling Party consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Rawleigh Building Site ("Site") located in Freeport, Illinois. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, during 1999 and 2000 EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. The EPA response actions included the removal of mercury from the floor in two areas of Building 6, removal of batteries, thermostats and transformers from several buildings within the facility, removal of containerized wastes, removal of aboveground and underground storage tanks, and removal of friable asbestos containing materials.

5. In performing this response action, EPA has incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs associated with the response action. EPA and the Settling Parties recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

8. The United States has reviewed the Financial Information submitted by Settling ATP Respondents to determine whether they have an inability or a limited ability to pay response costs incurred and to be incurred at the Site, taking into consideration the ability of such parties to pay response costs and still maintain their basic business operations, including their overall financial condition and demonstrable constraints on their ability to raise revenues. Based upon the Financial Information provided by Settling ATP Respondents, the United States has determined that Settling ATP Respondents qualify for a reduction in settlement amount and/or an alternative payment method within the meaning of Section 122(g)(7) of CERCLA, 42 U.S.C. § 9622(g)(7), and alone are unable to make the payment specified in Section V (Payment of Response Costs). The Financial Information submitted by Settling ATP Respondents is identified in Appendix A, attached hereto.

III. PARTIES BOUND

9. This Agreement shall be binding upon EPA and upon Settling Parties and their successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid or incurred at or in connection with the Site for the response action at the Site outlined in paragraph 4 above, or for enforcement activities or any other activities related to the response action at the Site through the execution of this Agreement, plus accrued Interest on all such costs through such date.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling ATP Respondents" are those Settling Parties, Tusc. International, GP, Tusc. Corp. No. 1, Inc. and Tusc. Corp. No. 4, Inc. who have submitted Financial Information demonstrating an inability or a limited ability to pay response costs and, as such, have qualified for a reduced settlement amount and/or an alternative payment method as provided in Section V (Payment of Response Costs).

k. "Settling Parties" shall mean Tusc. Corp. No. 1, Inc., Tusc. Corp. No. 4, Inc., Tusc. International, GP, and The Tuscarora Corporation.

l. "Site" shall mean the Rawleigh Building Superfund site, encompassing eight inter-connected buildings and the grounds adjacent to the buildings within a foot print measuring

approximately 4.6 acres, located in the City of Freeport, County of Stephenson, State of Illinois.

m. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

11. Within 5 business days after Settling Parties receive notice from EPA that this Agreement has been signed by EPA and approved by the Attorney General or his/her designee, The Tuscarora Corporation, the Settling Party who is not a Settling ATP Respondent, shall deposit \$35,000.00 into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the "Escrow Account"). If the Agreement is not made effective after public comment, the monies placed in escrow, together with accrued interest thereon, shall be returned to the Tuscarora Corporation. If the Agreement is made effective after public comment, The Tuscarora Corporation shall, within 15 days after receiving notice that the Agreement is effective, order the Escrow agent to pay the monies in the Escrow Account to EPA in accordance with Paragraphs 12 and 13 below.

12. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures which EPA Region 5 agrees to provide to The Tuscarora Corporation at the time it gives notice that the Agreement has been made effective, and shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number B5 G4.

13. *At the time of payment*, The Tuscarora Corporation shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number B5 G4.

14. The total amount to be paid pursuant to Paragraph 11 shall be deposited in the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH AGREEMENT

15. Interest on Late Payments. If The Tuscarora Corporation fails to make any payment required by Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

16. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 11 are not paid by the required date because The Tuscarora Corporation has failed to comply with paragraph 11 of this Agreement, and

The Tuscarora Corporation has not caused the sum of \$35,000.00, with interest, to be paid to EPA in accordance with paragraphs 12 and 13 within five days of receiving notice that payment was not received, then The Tuscarora Corporation shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 15, Five Hundred (\$500.00) Dollars per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and the Site Spill ID Number. The Tuscarora Corporation shall send the check (and any accompanying letter) to:

United States Environmental Protection Agency
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

c. At the time of each payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section (Notices and Submissions). Such notice shall identify the EPA Region and Site Spill ID Number B5 G4.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment.

17. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with the requirements of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall be jointly and severally liable for reimbursing the United States for all costs of such action, including but not limited to costs of attorney time.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse The Tuscarora Corporation from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

19. Covenant Not to Sue by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. With respect to Settling ATP Respondents individually, this covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by each Settling ATP Respondent. If the Financial Information submitted by any Settling ATP Respondent is subsequently determined by EPA to be false or, in any material respect, inaccurate, as to that Settling ATP Respondent, this covenant not to sue and the contribution protection in Paragraph X of this Agreement shall be null and void. Such action to revoke the covenant not to sue shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling ATP Respondent's false or materially inaccurate information. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

20. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 19. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Setting Parties with respect to:

- a. liability for failure of Settling Parties to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

22. Notwithstanding any other provision of this Agreement, the United States reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen proceedings against any individual Settling ATP Respondent in this action or in a new action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by any such Settling ATP Respondent, or the financial certification made by any such Settling ATP Respondent in Section XII is false or, in a material respect, inaccurate.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

23. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Illinois, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

24. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

25. Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Parties with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

26. The waiver in Paragraph 25 shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Settling Party. This

waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

27. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

28. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

29. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

30. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

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31. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

32. Until 7 years after the effective date of this Agreement, each Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

33. After the conclusion of the 7-year document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Parties shall deliver any such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

XII. CERTIFICATIONS

34. Each Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

35. Each Settling ATP Respondent further certifies individually that it has submitted Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial

Information was submitted to EPA and the time Settling ATP Respondent executes this Agreement.

XII. NOTICES AND SUBMISSIONS

36. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and the Settling Parties.

As to EPA:

Steven P. Kaiser
Associate Regional Counsel
U.S. EPA (C-14J)
77 W. Jackson Boulevard
Chicago, Illinois 60604

contact in the Regional Comptroller's Office

Cyprian Ejasa, Financial Specialist
Program Accounting and Analysis Section
U.S. EPA (MF-10J)
77 W. Jackson Boulevard
Chicago, Illinois 60604

As to Settling Parties:

William A. White, Esq.
MOORE & VAN ALLEN
Suite 4700
100 North Tryon Street
Charlotte, NC 28202-4003

XIII. INTEGRATION

37. This Agreement constitutes the final, complete and exclusive agreement and

understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

XIV. PUBLIC COMMENT

38. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XV. ATTORNEY GENERAL APPROVAL

39. The Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

XVI. EFFECTIVE DATE

40. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: Richard Karl
Richard Karl, Director
Superfund Division
U.S. EPA, Region 5

12-21-05

THE UNDERSIGNED SETTLING PARTY enters into this Agreement relating to the Rawleigh Building Site, City of Freeport, County of Stephenson, State of Illinois:

FOR SETTLING PARTY:

by: 

Tusc. Corp. No. 1, Inc.

P. O. Box 912, Rocky Mount, NC 27802

Address

By: E. Wayne Gibson

Name

9/13/05

Date

THE UNDERSIGNED SETTLING PARTY enters into this Agreement relating to the Rawleigh Building Site, City of Freeport, County of Stephenson, State of Illinois:

FOR SETTLING PARTY:

by: 

Tusc. Corp. No. 4, Inc.

P. O. Box 912, Rocky Mount, NC 27802

Address

By: E. Wayne Gibson

Name

9/13/05

Date